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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1034

FREDERICK KILLE,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	10
Appendix:	
1. Opinion and Judgment of Court of Special Appeals	1a
2. Order of Court of Appeals of Maryland denying Writ of Certiorari	4a

Table of Citations

Cases

Kille v. State, 14 Md. App. 465; 287 Atl. 2d 310	7
Lewis v. United States, 385 U.S. 206	6

Constitution

Fourth Amendment to Constitution of United States	2

Statutes

28 U.S.C. Sec. 1257(3)	2
Art. 27, Sec. 287(a) of Annotated Code of Maryland (1971 Replacement Vol.)	3

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The petitioner Frederick Kille respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Special Appeals of Maryland entered in this proceeding on August 1, 1973.

OPINION BELOW

The unreported per curiam opinion of the Court of Special Appeals of Maryland appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland was entered on August 1, 1973. A timely petition for a writ of certiorari was denied by the Court of Appeals of Maryland

on October 9, 1973; copy of said Order appears in the Appendix hereto. This petition for certiorari was filed within ninety days of the last mentioned date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

The Court of Special Appeals of Maryland has construed the Fourth Amendment to the Constitution of the United States as sanctioning a warrantless governmental intrusion into the privacy of the Petitioner's home by its refusal to suppress evidence seized by an undercover governmental agent who had gained entry to this home by trickery and deception. The questions presented are:

1. Should the evidence seized have been suppressed as the "fruits" of an unlawful and unreasonable intrusion into the privacy of the Kille home?

2. Should the evidence seized have been suppressed because of the failure of the governmental agent to appraise Kille of the real purpose of his visit and to advise him of his rights, under the Fourth Amendment, to refuse a warrantless seizure in his home?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States:

The Fourth Amendment thereto:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF CASE

On the 7th day of September, 1972 a jury in Cecil County, Maryland found the Petitioner guilty of possessing

marihuana in violation of Section 287(a) of Article 27 of the Annotated Code of Maryland. Thereafter, on October 17, 1972, he was sentenced by the Circuit Court for Cecil County to serve ninety days in the Cecil County jail.

An appeal was seasonably taken from this judgment and sentence to the Court of Special Appeals of Maryland, which, in its unreported per curiam opinion filed August 1, 1973, affirmed the judgment entered below. (No. 755 September Term, 1972) (App. 1.) A petition for a writ of certiorari was filed in the Court of Appeals of Maryland and was denied by that Court on the 9th day of October, 1973, (Miscellaneous Docket No. 229 (Criminals), September Term 1973) (App. 4a).[1]

It has been the contention of the Petitioner, not only throughout his first trial, but throughout the second trial, that the rights guaranteed him under the Fourth Amendment had been violated and that his conviction was obtained by the admission into evidence of certain items which, he contends, were unlawfully seized as a result of a warrantless intrusion into the privacy of his home by an undercover governmental agent.

The violation of his Fourth Amendment rights was first put in issue by Kille seven days after his arraignment by filing a motion to suppress. It was again raised prior to the second trial by a new motion to suppress filed July 14, 1972, which motion was overruled by the trial court in a Memorandum Opinion filed September 1, 1972 (Rec. 51):

> "The Court therefore denies the motion of the defendant Kille to suppress as evidence in the case against him the following articles seized at the time of his arrest on or

[1] At an earlier trial the Petitioner had been convicted of possessing marihuana and two other charges but these convictions were reversed on appeal because of prejudicial remarks made by the State's Attorney in final argument. *Kille v. State,* 14 Md. App. 465, 287 Atl. 2d 310.

> about September 19, 1970, to wit: ashtray with residue, brown pipe with black stem containing greenish brown vegetable substance; corncob pipe with residue; and a plastic bag containing a greenish-brown vegetable substance."

Undaunted by the trial court's ruling on the motion to suppress, Kille persisted in objecting to the admission into evidence of the above items at the trial, but to no avail; and he again attacked the admission of these items into evidence as violative of his Fourth Amendment rights by the filing of a Motion for a Judgment of Acquittal at the completion of the State's case and again at the conclusion of the entire case. These motions were summarily denied (Rec. 52).

On the appeal to the Court of Special Appeals of Maryland Kille again asserted that his rights under the Fourth Amendment had been violated, as will more fully appear from the second paragraph of that Court's unreported opinion (App. 1).

> "His appeal contends the trial court wrongfully refused to suppress evidence allegedly taken in violation of constitutional rights assured by the Fourth Amendment."

The facts surrounding the seizure of the articles which Kille sought in vain to have excluded from evidence are briefly outlined below.

In the early morning of Wednesday, September 16, 1970 a certain George Joseph Baluta made a complaint to the Maryland State Police at North East, Maryland that the Petitioner had marihuana in his home on Russell Road near Elkton, Cecil County, Maryland.

Acting upon this information State Police Lieutenant Porter of the North East Barracks obtained from police

headquarters the services of Trooper Sherman, a skilled undercover investigator, who was to try to meet Kille and, without disclosing his identity or purpose, was to attempt to inveigle an invitation to the Kille home so that he might hear and observe any illegal acts that might be taking place there. Although there was ample time to have obtained a warrant to search the Kille home, no thought was given to the obtension of a search warrant because, as the State's Attorney conceded, there was no probable cause to support the issuance of a search warrant to search the Kille home (Page 29 of transcript of hearing on Motion to Suppress of March 4, 1971).

As fate would have it, Trooper Sherman, an expert in deception and deceit, was successful in meeting Kille three days later (Saturday, September 19, 1970) and in a matter of minutes had succeeded in wheedling an invitation to the Kille home for later that evening.

When Trooper Sherman and Baluta presented themselves at the door of the Kille home, they were admitted by Kille. Sherman did not undertake to advise Kille that the real purpose of his visit was investigatory and not social, nor did Sherman advise Kille that he did not have to submit his home to a warrantless intrusion which was to observe if any unlawful acts were taking place there.

Immediately upon entering the Kille kitchen Trooper Sherman stated he smelled marihuana smoke and observed the items, which he later seized and which were admitted in evidence at the trial over Kille's objections.

REASONS FOR GRANTING WRIT

The reasons for granting the writ of certiorari in the instant case transcend the issue of whether Frederick Kille should serve ninety days in the Cecil County jail because a small

quantity of marihuana was seized in his home, in violation of the criminal laws of Maryland.

The real issue in this case is vital to the rights of all people to be secure in the privacy of their homes and to be protected from those governmental invaders who, by lies, tricks, and deception, gain admission into the home for purposes not solicited or contemplated by the homeowner.

It is vital that this Court avail itself of the factual situation presented by this case to declare and strike down warrantless invasions of the home by governmental undercover agents, whose sole purpose is to hear and observe what is taking place therein.

It is vital that this Court declare that the people of these United States are not to be subjected to raids upon their residences by undercover agents who have gained access by deceptive means.

It is vital that this Court shall not permit constitutional rights to be determined on the outcome of the "pitting" of the guileful and garrulous undercover agent against the gullible and unsuspecting home owner.

It is vital that this Court not permit warrantless searches and seizures where entry is gained by trickery and deception rather than by use of a search warrant issued upon probable cause by a judicial officer.

It is the contention of the Petitioner that the decision of the Court of Special Appeals of Maryland on the Fourth Amendment issue of unreasonable search and seizure is in conflict with the principles announced by this Court in *Lewis v. United States*, 385 U.S. 206. This contention may, at first blush, seem puzzling in view of the fact the Court of Special Appeals cites *Lewis* as being "completely dispositive" of Kille's claim that the seizure by Trooper Sherman of the

pipes, ashtray and greenish-brown vegetable substance violated his Fourth Amendment rights.

Lewis, of course, involved a seizure made by a federal narcotics agent who, by misrepresenting his true identity, entered into a business transaction with the homeowner involving the purchase by the agent of marihuana. In furtherance of their business transaction the homeowner invited the agent into his home on two separate occasions, where illegal sales were made. Lewis contended this intrusion into his home was in violation of his Fourth Amendment rights and the fact that he had invited the intruder did not amount to a waiver of his rights because the invitation was induced by deception and fraud.

This Court, speaking through Chief Justice Warren, quickly pointed out that Lewis had invited the agent into his home for a felonious purpose and that by converting the home into a commercial center, it lost all its sanctity as a home and that the agent could enter the premises for the very purposes contemplated by the occupant.

The instant case is clearly distinguishable from *Lewis*. Here the invitation was wheedled out of Kille. There was no commercial or business transaction that brought Trooper Sherman to the Kille home; the only purpose contemplated by Kille was of a social nature. The purpose of Trooper Sherman, as he testified, was to see and hear what was going on in the Kille home and it is urged that the seizure of the items sought to be suppressed was in violation of Kille's Fourth Amendment rights.

The opinion of the Court of Special Appeals of Maryland, as it appears in the Appendix to this Petition, relies chiefly on its opinion in *Kille v. State*, 14 Md. App. 465, where it rejected the precise contentions that Kille raises again in this petition.

It is the contention of the Petitioner that the Court of Special Appeals was either not willing or not able to distinguish the facts in *Lewis* from the facts in the instant case. *Lewis* was decided on the basis that the homeowner converted his home into a commercial center and thereby the home lost the protection to which it would have otherwise been guaranteed under the Fourth Amendment. Here there was no contemplation of commercial or business transactions between Kille and Trooper Sherman. It is this distinction that makes the seizure in *Lewis* lawful but the seizure in the instant case a violation of Kille's constitutional rights under the Fourth Amendment.

The Court of Special Appeals ignored the criteria of commercialism that this Court held to be a determining and distinguishing factor in the decision in *Lewis*. This Court, speaking through Chief Justice Warren, at page 211 of the opinion, stated:

> "A government agent, in the same manner as a private person, may accept an invitation *to do business* and may enter upon the premises for the very purposes contemplated by the occupant." (Emphasis added.)

In ignoring the criteria of commercialism, the Court of Special Appeals chided the Petitioner when it stated at page 2 of its opinion:

> "The Appellant here seeks to distinguish *Lewis* on the ground that the invitation in the case at bar was issued for social purposes and not for commercial purposes. The appellant may find moral support in the concurring opinion of Justices Brennan and Fortas which upheld the conviction in *Lewis* solely on the ground that the use of the apartment for commercial purposes operated to divest it of its Fourth Amendment protection. The majority opinion of Chief Justice Warren, speaking for six members of the Court, on the other hand, offers the appellant no such refuge. The Court held squarely that

> a government agent, 'in the same manner as a private person', may accept invitations* and may enter upon premises 'for the very purposes contemplated by the occupant'."

A glance at the quotation from *Lewis* set forth above will show that Chief Justice Warren and six members of the Court did, in fact, rely on commercialism when they included the words "to do business" and it is significant that the Court of Special Appeals, purportedly citing the language of the Chief Justice, either carefully or carelessly omitted the words "to do business" from the last sentence of the quoted portion of its opinion so that the entire meaning of this Court's language is distorted and aborted.

It is incredible that the Court below should, without explanation or comment, readopt the language of its earlier opinion in *Kille v. State, supra* after the Petitioner had painstakingly pointed out in his Brief that the purported quotations from *Lewis* were inaccurate and that significant language had been omitted in that Court's translation of this Court's opinion.

Instead of considering anew the critical points raised by the Petitioner, the Court of Special Appeals of Maryland swept the Petitioner's case under the judicial rug by rendering an unreported per curiam opinion and, by its judgment has denied the Petitioner the rights guaranteed him under the Fourth Amendment.

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* the words "to do business" were omitted here.

CONCLUSION

For the reasons hereinbefore set forth, a writ of certiorari should issue to review the judgment and opinion of the Court of Special Appeals of Maryland.

Respectfully submitted,

WILLIAM B. EVANS,
Counsel for Petitioner.

APPENDIX

PER CURIAM:

Frederick Kille was convicted by a jury in the Circuit Court for Cecil County of possession of marihuana. He was sentenced to the Cecil County Jail for the term of ninety days.

His appeal contends that the trial court wrongfully refused to suppress evidence allegedly taken in violation of constitutional rights assured by the fourth amendment.

We rejected the precise contention in an earlier appeal. *Kille v. State*, 14 Md. App. 465 (reversed on other grounds). In that prior appeal we said at page 472:

> The appellant's first contention is that the State Trooper only gained the vantage point within the appellant's home from which he could observe criminal activity and from which he could observe incriminating evidence by a subterfuge. He claims this to be a violation of the Fourth Amendment. He reads the Amendment overbroadly. Its office is to protect persons against unwarranted physical intrusions carried out against the will and without the consent of the victim. It is not intended to guard against the mistaken belief, howsoever produced, which leads an occupant to the imprudent issuing of invitations. *Lewis v. United States*, 385 U.S. 206, is completely dispositive of the appellant's contention in this regard. In *Lewis*, a government undercover agent assumed the role of a narcotics addict and, in that guise, was invited into Lewis's apartment for the purpose of purchasing narcotics. Incriminating evidence was discovered by the undercover agent, was seized and was introduced at Lewis's trial. Lewis claimed that the entry into his apartment by means of a stratagem constituted a violation of the Fourth Amendment. He found support only in the lone dissent of Justice Douglas.
>
> The appellant here seeks to distinguish *Lewis* on the ground that the invitation in the case at bar was issued for social purposes and not for commercial purposes. The appellant may find moral comfort in the concurring

opinion of Justices Brennan and Fortas which upheld the conviction in *Lewis* solely on the ground that the use of the apartment for commercial purposes operated to divest it of Fourth Amendment protection. The majority opinion of Chief Justice Warren, speaking for six members of the Court, on the other hand, offers the appellant no such refuge. The Court held squarely that a government agent, "in the same manner as a private person," may accept invitations and may enter upon premises "for the very purposes contemplated by the occupant." In commenting generally upon the need for undercover activity as an indispensable investigative technique, the Court said, at 208-209:

> "His only contentions are that, in the absence of a warrant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and that the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception.
>
> Both petitioner and the Government recognize the necessity for some undercover police activity and both concede that the particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception. Indeed, it has long been acknowledged by the decisions of this Court, . . . that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents."

Although additional testimony was taken on the motion to suppress at a second hearing, (with the transcript of the hearing on the earlier motion incorporated as an integral part of the second) the trial court found no basis for a change of his original position. He said in a memorandum opinion: "The additional testimony does not change the Court's finding of facts * * *. The Court remains convinced that Trooper Sherman entered the Defendant's home as an invitee and guest. His entry was lawful and for the reasons stated * * * and * * * the opinion of Judge Moylan, speak-

ing for the Court of Special Appeals, * * * filed * * * on February 14, 1972, the subsequent arrest and search and seizure was lawful".

We find nothing in the additional testimony of the appellant or his witness Raech (separately charged and convicted of the same offense) that permits any other conclusion than that the appellant, either directly, or by necessary implication, invited Trooper Sherman into his home. Accordingly, we adhere fully to the previously quoted excerpts from our prior decision.

Two cases in the Supreme Court, while quite dissimilar factually, use language bringing the subject case into sharp focus. One — *Katz v. U. S.*, 389 U.S. 347, said at page 351:

"What a person *knowingly* exposes to the *public*, even in his own home or office, is not a subject of Fourth Amendment protection." The second — *Hoffa v. U. S.*, 385 U.S. 293, said at page 302: "The petitioner, in a word, was not relying on the security of the hotel room (home); he was relying upon his misplaced confidence that Partin (Sherman) would not reveal his wrongdoing." (Parenthetical insertions added.)

JUDGMENT AFFIRMED

COSTS TO BE PAID BY APPELLANT.

In The

COURT OF APPEALS OF MARYLAND

Miscellaneous Docket No. 239 (Criminal)

September Term, 1973

(No. 755, September Term, 1972

Court of Special Appeals)

Frederick Kille,

v.

State of Maryland.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY,

Chief Judge.

Date: October 9, 1973.